PET FAR EASTERN (M) SDN BHD

v.

TAY YOUNG HUAT & ORS

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-362 OF 1998]
30 APRIL 1999

CIVIL PROCEDURE: *Striking out - Rules of the High Court 1980, O. 18 r. 19(1) - Principles - Obviously unsustainable, meaning of - Whether there should be extensive examination of documents and facts to determine if plaintiff has cause of action*

CIVIL PROCEDURE: *Striking out - Appearance - Whether defendant who entered unconditional appearance can invoke O. 18 r. 19(1) Rules of the High Court 1980*

CIVIL PROCEDURE: *Pleadings - Sufficiency - Whether cause of action sufficiently identified - Contents of pleadings*

TRUSTS: *Constructive trust - Moneys received pursuant to illegal contract - Whether person who received moneys a constructive trustee - Whether gambling company which received moneys from gambler who gambled using embezzled money a constructive trustee*

CONTRACT: *Gaming or wagering contract - Gambling on vessel - Whether legal in international waters - Whether illegal in Malaysia - Necessity for licence under s. 27A Common Gaming Houses Act 1953 - Whether Malaysian law recognises gambling contracts - Whether concept of 'no-man's land' recognised*

The 1st defendant, the finance and accounts manager of the plaintiff company, had embezzled the plaintiff's bank account of RM8.25m. The 2nd defendant company admitted receiving the sum of RM4.5m, stating that it was a payment by the 1st defendant to it in consideration of gambling activities it provided on board a vessel in international waters. The 1st defendant had deposited the RM4.5m with the 2nd defendant before boarding the vessel for gambling purposes. Once the 1st defendant was on board, he was issued with playing chips to the amount deposited earlier.

The plaintiff then filed an action against the 2nd to the 6th defendants as constructive trustees of the moneys received and for conversion. The 2nd defendant entered appearance after the writ of summons and the statement of claim were served on it. Thereafter, the 2nd defendant filed and served its statement of defence. Subsequently, the 2nd defendant filed an application to strike out the plaintiff's action. The senior assistant registrar dismissed the application and the 2nd defendant appealed to the judge in chambers. The issues in the instant appeal were: (i) whether the plaintiff was required to plead exactly the circumstances which led to the 2nd defendant having knowledge of the fraud perpetrated by the 1st defendant; (ii) whether the moneys paid to the 2nd defendant were in pursuance of an illegal contract, the illegality of which would render the 2nd defendant a constructive trustee of the moneys so received; and (iii) whether the 2nd defendant could have resort to O. 18 r. 19(1) of the Rules of the High Court 1980 ('the RHC') after having entered an unconditional appearance and served its statement of defence.

Held:

[1a] The plaintiff's pleadings were professionally drafted and had sufficiently identified its cause of action against the 2nd defendant. A pleading must contain only a statement of the material facts on which the party pleading relies and not the evidence by which they are to be proved.

[1b] It was almost impossible for the plaintiff to give information that was within the personal knowledge of the 2nd defendant which would establish a constructive trust. Such evidence could only be elicited at a trial by *viva voce* evidence. Justice would be denied if the plaintiff was not permitted to adduce evidence at a proper trial.

[2a] The summary process under O. 18 r. 19 of the RHC cannot be exercised by a minute and protracted examination of the documents and the facts of the case so as to ascertain whether a plaintiff has a cause of action. That should be done at the trial proper where oral evidence can be led and tested by cross-examination.

[2b] A case should only be struck out if it is obviously unsustainable. The operative word is not "unsustainable" but "obviously", which denotes that on the face of it the claim is plainly or evidently unsustainable in law.

[2c] Upon the available affidavit evidence, the plaintiff's action could not be said to be obviously unsustainable. There were issues, both of fact and law, that had to be tried.

[3] The second defendant had entered an unconditional appearance and had served its statement of defence on the plaintiff. Hence, it was precluded from invoking O. 18 r. 19(1) of the RHC.

[4] The contention that the gambling activities took place in international waters and that as a result there was no requirement for the 2nd defendant to hold a licence under Malaysian law was without merit. The RM4.5m was paid to the 2nd defendant within Malaysian jurisdiction. Since the consideration for which the 2nd defendant received the RM4.5m was illegal, it could not be considered a bona fide third party who had given value. Thus, the 2nd defendant must be deemed to be a constructive trustee for the plaintiff for the said sum and must so account to the plaintiff for it.

Obiter:

[1] The gambling activities conducted by the 2nd defendant, whilst legal in international waters, was illegal in Malaysia, unless the 2nd defendant had a valid licence to carry out the same under s. 27A of the Common Gaming Houses Act 1953. Malaysian law does not recognise gambling contracts or the concept of 'no-man's land'.

Case(s) referred to:

A-G of the Duchy of Lancaster v. London and North Western Railway Co [1892] 3 Ch 274 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Seng Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 ***(refd)***

Anderson Ltd v. Daniel [1924] 1 KB 138 ***(refd)***

Applegarth v. Colley [1842] 10 M & W 723 ***(refd)***

Ashmore, Benson, Pease & Co Ltd v. AV Dawson Ltd [1973] 1 WLR 828 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 3 MLJ 36 ***(refd)***

Bannister v. Bannister [1948] 2 All ER 133 ***(refd)***

Barnes v. Addy [1874] 9 Ch App 244 ***(refd)***

Beatty v. Guggenheim Exploration Co 255 NY 380 ***(refd)***

Belmont Finance Corpn v. Williams Furniture Ltd (No 2) [1980] 1 All ER 393 ***(refd)***

British Reinforced Concrete Engineering Co v. Lind [1917] 86 LJ Ch 486 ***(refd)***

Carl Zeiss Stiftung v. Herbert Smith & Co & Anor (No 2) [1969] 2 Ch 276 ***(refd)***

Carlill v. Carbolic Smoke Ball Co [1892] 2 QB 484 ***(refd)***

Carly v. Farrelly [1975] 1 NZLR 356 ***(refd)***

Commodore Pty Ltd v. Perpetual Trustee [1984] 1 NZLR 324 ***(refd)***

Cooke v. Head [1972] 2 All ER 38 ***(refd)***

Doyle v. Olby Ltd [1969] 2 QB 159 ***(refd)***

Edwards v. Bates & Savery [1844] 135 ER 238 ***(refd)***

EG Tan & Co v. Lim & Tan & Anor [1987] 2 MLJ 149 ***(refd)***

Ellesmere v. Wallace [1929] 2 Ch 1 ***(refd)***

English v. Dedham Vale Properties Ltd [1978] 1 WLR 93 ***(refd)***
Espinasse v. Lowe [1764] 7 Bro Parl Cas 345 ***(refd)***
Eves v. Eves [1975] 3 All ER 768 ***(refd)***
Govindji & Co v. Soon Hin Huat [1982] 1 MLJ 255 ***(refd)***
Green v. Weatherill [1929] 2 Ch 213 ***(refd)***
Heseltine v. Heseltine [1971] 1 All ER 952 ***(refd)***
Hill v. William Hill (Park Lane) Ltd [1949] AC 530 ***(refd)***
Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd [1899] 1 QB 86 ***(refd)***
Hussey v. Palmer [1972] 3 All ER 744 ***(refd)***
Lake v. Bayliss [1974] 2 All ER 1114 ***(refd)***
Law v. Dearnley [1950] 1 KB 400 ***(refd)***
Lee Leong Sim v. Regina [1957] MLJ 168 ***(refd)***
Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(refd)***
Levene v. Brougham [1909] 25 TLR 265 ***(refd)***
Levy v. Yates [1838] 8 A & E 129 ***(refd)***
Lim Pong Joo v. Regina [1957] MLJ 122 ***(refd)***
Lim Seak Huat v. Malayan United Realty Sdn Bhd [1997] 5 CLJ 336 ***(refd)***
Lipkin Gorman v. Karpnale [1991] 2 AC 548 ***(refd)***
Lyus v. Prowsa Developments Ltd [1982] 2 All ER 953 ***(refd)***
MacDonald v. Green [1951] 1 KB 594 ***(refd)***
Moses v. Macferlan [1760] 2 Burr 1005 ***(refd)***
NW Salt Co Ltd v. Electrolytic Alkali Co Ltd [1913] 3 KB 425 ***(refd)***
Phillips v. Copping [1935] 1 KB 15 ***(refd)***
Ram Partap v. Emperor [1912] 39 Cal 968 ***(refd)***
Re Eyre-Williams v. Williams [1923] 2 Ch 533 ***(refd)***
Re Mahmoud & Ispahani [1921] 2 KB 716 ***(refd)***
Read v. Anderson [1884] 13 QBD 779 ***(refd)***
Selangor United Rubber Estates Ltd v. Cradock (No 3) [1968] 2 All ER 1073 ***(refd)***
Sharp v. Ellis; Re Edward Love & Co Pty [1971] 20 FLR 199 ***(refd)***
Soar v. Ashwell [1893] 2 QB 390 ***(refd)***
Suppuletchimi v. Palmco Bina Sdn Bhd [1994] 2 CLJ 561 ***(refd)***
Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***
Wenlock v. Moloney & Ors [1965] 2 All ER 871 ***(refd)***
Williams v. Wilcox 8 A & E 331 ***(refd)***

Legislation referred to:
Betting Act 1953, ss. 2(1), 4(1)(d), 7
Common Gaming Houses Act 1953, ss. 2(1), 3, 4(1), 10, 27A
Contracts Act 1950, s. 24
Rules of the High Court 1980, O. 18 r. 19(1)

Gaming Act 1845 [UK], s. 18

Other source(s) referred to:
Mallal's Supreme Court Practice, 2nd edn, vol 1, p 219

For the plaintiff - Clarence Edwin; M/s Abdul Raman Saad & Assocs
For the 2nd defendant - Tan Choon Lim; M/s Lim & Hooi

Reported by SA Rahim

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal in encl. 80 against the decision of the senior assistant registrar ("SAR") dismissing the second defendant's (New Century Development (M) Sdn Bhd [Company No: 223293-V]'s) application in encl. 64 to strike out the plaintiff's case under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC"). Enclosure 64 was supported by an affidavit of the second defendant affirmed by Ng Eng Leng, a Singaporean, on 12 August 1998 and filed on 4 September 1998 as reflected in encl. 63. The reply to encl. 63 would be encl. 73 which was the affidavit in reply of Hsueh Yong You, a manager of the plaintiff's company, that was affirmed on 15 October 1998. Hsueh Yong You too affirmed an affidavit in reply on 22 September 1998 which was filed on the same date as seen in encl. 68. The second defendant also relied on the affidavits in encl. 27 (affirmed by Ng Eng Leng, a director of the second defendant, on 28 July 1998 and filed on the next date) and encl. 28 (affirmed by Ng Eng Leng on 28 July 1998 and filed on 29 July 1998). The plaintiff, on the other end of the scale, relied heavily on the affidavit in support in encl. 4 that was affirmed by Hsueh Yong You on 26 June 1998 which was filed on 30 June 1998. The plaintiff also relied on the second affidavit of Hsueh Yong You that was affirmed on 18 August 1998 and filed on the next day as reflected in encl. 53.

The Salient Facts

The facts, in its correct perspective, may be stated as follows:

It is said that the plaintiff is a company incorporated in Malaysia and governed by Malaysian law and has its place of business at PLO 69, Kawasan Perindustrian Senai III, 81400 Senai, Johor. The story unfolded when the plaintiff sometime in 1997, to be precise 3 July 1997, entered into a contract of employment with the first defendant (Tay Young Huat also known as Eugene Tay Yong Huat). It is pertinent to note that the first defendant had been appointed to the position of finance and accounts manager in the plaintiff's company. The first defendant while in the plaintiff's employment committed fraud and embezzlement and, in fact, embezzled the plaintiff company's bank account with the Hongkong Bank Malaysia Berhad, Johor Bahru branch ("bank") to the tune of RM8.25 million. A colossal sum. Fraud was pleaded in the statement of claim and its particulars were particularised therein. It seemed that the first defendant had committed the fraud by faxing to the bank requests to issue bankers drafts in favour of the second to the sixth defendants.

But these requests were not issued by the authorised signatories to the plaintiff's account with the bank. It must be presumed that the fraud was committed by erasing the names of the recipients, the dates and amounts on previous requests made by the duly authorised agents of the plaintiff's company by substituting the details of the second to the sixth defendants and therein faxing these details to the bank. It was a *modus operandi* designed to hoodwink the bank thereby causing massive losses to the plaintiff's company. The first defendant himself would collect the bankers drafts from the bank and then he would send them to the second, third, fourth, fifth and sixth defendants. What the first defendant did with the bankers drafts were not within the knowledge of the plaintiff. But from the records available from the bank, the bankers drafts were presented for payment at the following bank accounts of the defendants:

Defendants	Amounts Credited	Accounts
(1) Second defendant [New Century Development (M) Sdn Bhd (Company No:223293-V)]	RM4,500,000.00	Malayan Banking Berhad, Taman Sri Bahagia, Tampoi, Account No: 001011316200
(2) Third defendant [Rising Portfolio Sdn Bhd (Company No: 446959-X)]	RM2,250,000.00	Malayan Banking Berhad, Jalan Tebrau, Johor Bahru, Account No: 001020410607
(3) Fourth defendant [Star Cruise Administrative Services Sdn Bhd (Company No: 387793-P)]	RM1,000,000.00	Southern Bank Berhad, Jalan Cungah, Port Klang, Account No: 10040465
(4) Fifth defendant [Renaissance Cruises (M) Sdn Bhd (Company No: 283974-W)]	RM 250,000.00	Malayan Banking Berhad, Kota Raya, Johor Bahru, Account No: 0141415-9314
(5) Sixth defendant [Empress Cruise Lines Sdn Bhd (Company No: 270259-A)]	RM 250,000.00	UNKNOWN

In so far as the second defendant was concerned the bankers drafts for RM4.5 million were deposited in Malaysia in a bank known as Malayan Banking Berhad at Taman Sri Bahagia, Tampoi at account no: 001011316200 in favour of the second defendant.

It must be emphasised that the second defendant had admitted receiving the sum of RM4.5 million out of the bigger sum of RM8.25 million embezzled by the first defendant. The second defendant too had categorically stated that the sum of RM4.5 million was paid to the second defendant by the first defendant in consideration of gambling activities which the second defendant provided on board a vessel known as MV Amusement World in international waters and in which the first defendant took part unabasedly. There was no affidavit evidence as to the ownership of the vessel MV Amusement World nor as to the particulars of its registration. In which country the vessel MV Amusement World was registered in was not adverted to at all in the affidavit evidence. Mere conjectures can never be the basis of this judgment. In encl. 63, Ng Eng Leng, a director of the second defendant and a Singaporean, deposed an affidavit and at para. 4 thereof it was deposed that the proceeds thereof (referring no doubt to the RM4.5 million) have been used by the first defendant to gamble at the second defendant's cruise ship MV Amusement World. This was an averment which showed that that cruise ship or vessel MV Amusement World was said to belong to the second defendant but there was no supporting documentary evidence to that effect. In encl. 27, Ng Eng Leng deposed at para. 2 that on or about 15 April 1998, 22 April 1998, 29 April 1998, 6 May 1998, 18 May 1998, 26 May 1998, 28 May 1998 and 2 June 1998, the first defendant paid into the second defendant's account at Malayan Banking, Johor Bahru (this must necessarily refer to Malayan Banking Berhad, Taman Sri Bahagia, Tampoi, account no: 001011316200), demand drafts for RM500,000, RM750,000, RM300,000, RM900,000, RM250,000, RM500,000, RM500,000 and RM300,000 respectively as deposits for gambling facilities on board MV Amusement World in international waters. In encl. 28 at para. 12, Ng Eng Leng deposed that the second defendant being a commercial venture and service-orientated welcomed any visitors irrespective of race, creed, or colour on board the second defendant's cruise ship MV Amusement World to enjoy the ship's cruises to nowhere and to partake the hospitality cuisine and games on board and the second defendant would accept most currencies and demand drafts at its casino and for payments for food, amusement and gambling on board. That was a general averment by Ng Eng Leng. In the context of the present case, the first defendant deposited RM4.5 million with the second defendant's bank in Malayan Banking Berhad at Taman Sri Bahagia, Tampoi *vide* account no: 001011316200 before boarding the vessel or cruise ship MV Amusement World for gambling purposes. That RM4.5 million belonged to the plaintiff after the first defendant had embezzled

it from the plaintiff. Once the first defendant was on board the vessel or cruise ship MV Amusement World, the first defendant would be issued with playing chips in exchange for the amounts deposited earlier with Malayan Banking Berhad for gambling purposes. It was not amusing for the plaintiff to see RM4.5 million being embezzled and filtered out by the unscrupulous first defendant. Factually, this case was quite interesting. It involved gambling on board a vessel in international waters of which I have more to say in the later part of this judgment. Incidentally, all these salient facts can readily be extracted from encl. 4 at para. 14 of the affidavit in support of the plaintiff's summons-in-chambers application for an *ex parte* injunction and encl. 28 paras 9 and 10 of the affidavit in reply of the second defendant deposed through Ng Eng Leng. It would not be out of place to produce the original texts of paras 9 and 10 of encl. 28 and they were worded thus:

> 9. I wish to state further that the demand drafts from the 1st Defendant were given to the 2nd Defendant in good faith without knowledge of defects and for valuable consideration for facilities to gamble at the casino of "M/V AMUSEMENT WORLD" plying in international waters at all material times.
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> 10. When the demand drafts totalling RM4.5 million were paid to the 2nd defendant on 15.4.1998, 22.4.1998, 29.4.1998, 6.5.1998, 18.5.1998, 26.5.1998, 28.5.1998 and 2.6.1998, the proceeds were held as deposits for the 1st defendant's use when the 1st defendant went on board the cruise ship. When the 1st defendant patronised the casino of M/V Amusement World, the 1st defendant would be issued with playing chips in exchange for the amounts deposited earlier for gambling and any winnings were paid to the 1st defendant either in cash or in cheques. I annex hereto particulars of the demand drafts paid by the 1st defendant and the winnings paid to the 1st defendant either in cash or in cheques and marked as "NEL-1" hereto.

Of significance to note would be this. After the writ of summons and the statement of claim in encl. 2 were served on the second defendant, the latter through its solicitors Messrs Lim & Hooi entered an appearance. Thereafter the second defendant, again through its solicitors Messrs Lim & Hooi filed and served a statement of defence as reflected in encl. 35 on 1 August 1998. The second defendant moved rather sluggishly for they filed encl. 64 to strike out the plaintiff's case only on 4 September 1998.

The Plaintiff's Claim

It is interesting to explore the plaintiff's claim against the second defendant. The claim was grounded on constructive trust as reflected in encl. 21 of paras 15 and 16 of the statement of claim against defendants numbers two, three, four, five and six. I will now reproduce these paragraphs verbatim:

2nd to 6th Defendants

15. As regards the other defendants, the plaintiff has no knowledge of their rela-tionship with the 1st defendant. However, the plaintiff avers that they have no legal basis to receive the monies of the plaintiff. The plaintiff further avers that through the fraudulent actions of the 1st defendant, the other defendants are in receipt of moneys to which they are not entitled. To the extent that they have knowledge of the affairs of the 1st defendant, the other defendants would be constructive trustees and are liable to account to the plaintiff the use of the proceeds from the relevant demand drafts credited into their respective bank accounts. The plaintiff avers that it has no business relationship/transactions with the other defendants and therefore, the other defendants have actual and constructive knowledge/ notice that the monies they received in fact belonged to the plaintiff.

16. The plaintiff's case against the defendants is on the following basis:-

(a) as against the 1st defendant, for fraud, misappropriation, breach of fiduciary duties and/or breach of trust.

(b) as against the other defendants, for conversions and/or constructive trustees.

Constructive trust too was amply worded in encl. 4 particularly paras 21 and 22 thereof:

2nd to 6th Defendants

21. As regards the other defendants, I have no knowledge of their relationship with the 1st defendant. However, I verily believe they have no legal basis to receive the monies of the plaintiff. A mareva injunction to the sum of moneys that they have received from the account of the plaintiff should be ordered to compel them to disclose the basis of their receipt of the moneys and to account for the payment thereof. I believe in light of the evidence of the fraudulent actions by the 1st defendant, the other defendants may be in receipt of moneys to which they are not entitled. To the extent that they have knowledge of the affairs of the 1st defendant, the other defendants would be constructive trustees and are liable to account to the plaintiff the use of the proceeds from the relevant demand drafts credited into their respective bank accounts. Annexed hereto and marked collectively as "HYY-5" are copies of the Registry of Companies searches conducted on the 2nd to 6th defendants together with the physical inspection of the registered and/or business addresses of the other defendants.

22. I have been advised that the plaintiff has a serious issue to be tried as follows:-

(a) as against the 1st defendant, for fraud, misappropriation, breach of fiduciary duties and/or breach of trust.

(b) as against the other defendants, for conversions and/or constructive trustees.

Mr. Tan Choon Lim, learned counsel for the second defendant, argued that the plaintiff has no reasonable cause of action against the second defendant on the sole ground that the plaintiff has failed to plead the necessary ingredient of knowledge on the part of the second defendant. It is interesting to embark on the inquiry, at this juncture, of the concept of constructive trust or conversion. Edmund Davies LJ in *Carl Zeiss Stiftung v. Herbert Smith & Co And Another (No: 2)* [1969] 2 Ch. 276 at pp. 300 to 301 aptly described the doctrine of constructive trust in this way:

> The basic question raised by this appeal is whether the defendant solicitors hold the moneys of the plaintiffs as constructive trustees. The American Restatement of the Law of Restitution [1973] sets out to define a constructive trust by declaring in paragraph 160, page 640, that:
>
> > Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.
>
> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal advantage is not a *sine qua non*. Thus in *Nelson v. Larholt* [1948] 1 KB 339, it was not suggested that the defendant was himself one penny better off by changing an executor's cheques; yet, as he ought to have known of the executor's want of authority to draw them, he was held liable to refund the estate, both on the basis that he was a constructive trustee for the beneficiaries and on a claim for money had and received to their use. Nevertheless, the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call "want of probity," a feature which recurs through and seems to connect all those cases drawn to the court's attention where a constructive trust has been held to exist. *Snell's Principles of Equity* expresses the same idea by saying, 26th ed. [1966] at page 201, that:
>
> > A possible definition is that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties.
>
> It may be objected that, even assuming the correctness of the foregoing, it provides no assistance, inasmuch as reference to 'unjust enrichment,' 'want of probity' and 'the demands of justice and good conscience' merely introduces vague concepts which are in turn incapable of definition and which therefore provide no yardstick. I do not agree. Concepts may defy definition and yet

> the presence in or absence from a situation of that which they denote may be beyond doubt. The concept of 'want of probity' appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to the many authorities cited to this court. It is because of such a concept that evidence as to 'good faith,' 'knowledge' and 'notice' plays so important a part in the reported decisions.

A constructive trust is created and is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property (*Bannister v. Bannister* [1948] 2 All ER 133; *Hussey v. Palmer* [1972] 3 All ER 744, [1972] 1 WLR 1286 CA; and *Lyus v. Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044). That person will hold the property in a fiduciary capacity and by virtue of his ownership of or dealings with that fiduciary property that he acquired that specific property subject to the constructive trust (*Espinasse v. Lowe* [1764] 7 Bro Parl Cas 345 at 355 HL; *British Reinforced Concrete Engineering Co. v. Lind* [1917] 86 LJ Ch 486; *Re Eyre-Williams, Williams v. Williams* [1923] 2 Ch 533; and *Green v. Weatherill* [1929] 2 Ch 213). But a stranger who receives property in circumstances where he has actual or constructive notice that the property that is being transferred to him is a trust property then he is said to be a constructive trustee of that trust property (*Barnes v. Addy* [1874] 9 Ch App 244 at 251; *Soar v. Ashwell* [1893] 2 QB 390 at 400, 405 CA; *Belmont Finance Corpn v. Williams Furniture Ltd (No: 2)* [1980] 1 All ER 393 CA). Put bluntly, a person who holds property on a constructive trust is described as a constructive trustee in respect of that property (*Soar v. Ashwell (supra)*). Treating and regarding a person as a constructive trustee is merely a formula to impose an equitable personal liability to account (*Selangor United Rubber Estates Ltd v. Cradock (No: 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582; and *English v. Dedham Vale Properties Ltd* [1978] 1 All ER 382 at 398, [1978] 1 WLR 93 at 110). Lord Denning MR, that innovative judge, introduced in *Eves v. Eves* [1975] 3 All ER 768 at 771, [1975] 1 WLR 1338 at 1341 CA a wider scope to constructive trust. His Lordship boldly held that a trust would be imposed whenever justice and good conscience require it. It was according to his Lordship a liberalising process founded on large doses on the principles of equity where the legal owner cannot conscientiously keep the property for himself but to allow another party to have the property wholly or on a sharing basis. His Lordship felt that this equitable remedy can enable an aggrieved party to obtain restitution. Mahon J of New Zealand in the case of *Carly v. Farrelly* [1975] 1 NZLR 356 at 367 criticised the approach adopted by Denning MR in *Eves v. Eves (supra)* and his Lordship remarked that the "supposed rule of equity which is not only vague in its outline but which must disqualify itself from acceptance as a valid principle of

jurisprudence by its total uncertainty of application and result." For my part, I am constrained to say that constructive trust has been treated as a remedy for many cases of unjust enrichment. Cardozo J in *Beatty v. Guggenheim Exploration Co.,* 225 NY 380 at 386 [1919] observed that:

> ... a constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

Thus, a man may be treated to hold his house on constructive trust by sharing it with his wife (*Heseltine v. Heseltine* [1971] 1 All ER 952, [1971] 1 WLR 342 CA) or his mistress (*Cooke v. Head* [1972] 2 All ER 38, [1972] 1 WLR 518 CA). A vendor too who is bound by a contract for the immediate sale of land is in reality a trustee of the land for the purchaser (*Lake v. Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073).

Although the decision of Alliot J in *Lipkin Gorman v. Karpnale* [1991] 2 AC 548 was reversed by the House of Lords, what his Lordship said at p. 992 merits reproduction. This was what his Lordship said and it must surely apply to the factual matrix of the present case:

> One who receives money of another from a third person by winning it at a game of chance played with such third person is liable to the owner in an action at common law for 'money had and received:' Court of Appeals of Georgia in *Brown Low v. Davis* [1943] 25 S.E. (2d) 150. And: 'If bookmaker, as an incident of gambling, received money which cashier had stolen from his employer, the bookmaker would be liable to the employer for the stolen money:' Court of Civil Appeals of Texas in *Sinclair Houston Federal Credit Union v. Hendricks* [1954] 268 SW(2d) 290, 291.

It is germane to mention that the American Law Institute's Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts states that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." In 1844, Tindal CJ in *Edwards v. Bates and Savery* reported in [1844] 135 ER 238, at p. 241 remarked:

> When money has been received without consideration, or where it has been received justly in the first instance, and the consideration has failed afterwards, in such cases, the defendant holds the money, in justice and equity, to the use of the plaintiff.

Now, it is important to emphasise that the plaintiff too was relying on conversion. Such a claim is now known as a claim for money had and received. No one is allowed, under the law, to retain property belonging to another. It would be unjust to allow the second defendant to receive the embezzled money for free. In *Moses v. Macferlan* [1760] 2 Burr. 1005, 1012, Lord Mansfield rationalised the action for money had and received in these oft-quoted words:

> This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial, and therefore much encouraged. It lies for money which, *ex aequo et bono*, the defendant ought to refund, it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his minority, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play: because in all these cases the defendant may retain it with a safe conscience, though by positive law he was debarred from recovering ... The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Three requirements must be fulfilled before the principle of unjust enrichment can be activated:

(1) the defendant has been enriched by the receipt of a benefit;

(2) the enrichment was made possible at the expense of the plaintiff; and

(3) the retention of the enrichment by the defendant would be totally unjust.

Lord Mansfield once again remarked in *Moses v. Macferlen (supra)* at p. 1007 that the action for money had and received "lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or an undue advantage taken of the plaintiff's situation, contrary to the laws made for the protection of persons under those circumstances." In *Lipkin Gorman v. Karpnale Ltd (supra)* at p. 559 where a person who had stolen money used it to gamble, the court held that the gaming club was not required to repay the entire amount gambled but only their net winnings from the thief for the simple reason that the provision of gaming services was not regarded as good consideration.

The issues of the day and which called for deliberation are two folds:

(1) Whether the plaintiff was required to plead exactly the circumstances which led to the second defendant having knowledge of the fraud perpetrated by the first defendant?; and

(2) Whether the monies paid to the second defendant was made in pursuance of an illegal contract, the illegality of which would render the second defendant a constructive trustee of the monies so received?

The First Issue

In regard to the first issue, Mr. Clarence Edwin, learned counsel for the plaintiff, rightly argued rather eloquently that it would be next to impossible for any person in the plaintiff's position to be able to give details of information within the personal knowledge of the second defendant which would give rise to a constructive trust. Indeed the plaintiff could not even venture a conjecture on the kind of knowledge which the defendant had as the "state of a man's mind would be as much a fact as the state of his indigestion." Evidence of this nature can only be elicited at a trial by *viva voce* evidence where witnesses for the respective parties would be able to testify to their hearts' content. Clearly it would be a denial of justice if the plaintiff was not permitted to adduce evidence at the trial proper. The paramount function and duty of the courts would be to see that justice is done in all cases to all parties. As Lord Denning M.R. once said in *Doyle v. Olby Ltd* [1969] 2 QB 159, 166:

> We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.

and in the context of the present case there was no mistake at all on the part of the plaintiff's counsel. The pleadings, particularly paras. 15 and 16 of the statement of claim, as reproduced earlier were professionally drafted and, in my judgment, it sufficiently identified the plaintiff's cause of action against the second defendant. It must not be forgotten that every pleading must contain only a statement of the material facts on which the party pleading relies and not the evidence by which they are to be proved (per Farwell LJ in *N.W. Salt Co., Ltd v. Electrolytic Alkali Co Ltd* [1913] 3 KB 425). Lord Denman CJ once said in *Williams v. Wilcox*, 8 A. & E. p. 331:

> It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it, or the evidence sustaining the allegation.

To me only those facts that amount to a cause of action must be alleged. The plaintiff has done just that in the statement of claim. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion (*Commodore Pty Ltd v. Perpetual Trustee* [1984] 1 NZLR 324).

The Second Issue

With regard to the second issue, it would be ideal at the outset to categorically state that the gambling activities conducted by the second defendant, while legal in international waters, was illegal in Malaysia unless the second defendant held a valid licence to carry out such activities under s. 27A of

the Common Gaming Houses Act 1953 ("CGH Act"). Section 2(1) of the CGH Act defines "gaming" as:

> 'gaming' with its grammatical variations and cognate expressions means the playing of any game of chance or of mixed chance and skill for money or money's worth and includes the playing of any game specified in Column 1 of the First and Second Schedules.

and the case of *Ram Partap v. Emperor* [1912] 39 Cal. 968; 16 IC 171 explained the meaning of gaming in this way:

> Playing at any game for money, which is staked on the result of the game i.e., which is to be lost or won according to the success or failure of the person who has staked.

Thus, it can rightly be said that in order to establish gaming there must be evidence that the playing of the game involved an opportunity to the successful player to recover money or money's worth within the definition of the word "gaming" under s. 2 of the CGH Act (*Lim Pong Joo v. Regina* [1957] MLJ 122). I can do no better than to reproduce the observations of Rigby J in *Lee Leong Sim v. Regina* [1957] MLJ 168 when his Lordship aptly defined the meaning to the words "money's worth" to mean "a valuable and tangible consideration in lieu of money, such as, of course, a prize."

I will now proceed to examine the Betting Act 1953 where s. 2(1) thereof defines a "common betting house" as (the relevant parts only):

> 'common betting house' means:
>
> (i) any place kept or used for betting or wagering whether such betting or wagering, be in cash or on credit, on any event or contingency of or relating to any horse race or other sporting event or lottery to which the public or any class of the public has, or may have, access;
>
> (ii) any place kept or used for habitual betting or wagering on any such event or contingency as aforesaid, whether the public has, or may have, access thereto or not;

The word "place" appearing in the above definition is defined in s. 2(1) of the Betting Act 1953 as:

> ... any house, office, room or building, and any place or spot, whether open or enclosed, and includes a ship, boat or other vessel whether afloat or not, and any vehicle;

Then s. 4(1)(d) of the Betting Act 1953 enacts as follows:

(1) Any person who:

(d) receives directly, or indirectly, any money or valuable thing, for or in respect of any bet or wager on any such event or contingency as is mentioned in this Act, in a common betting-house or betting information centre;

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than twenty thousand ringgit and not more than two hundred thousand ringgit and shall also be punished with imprisonment for a term not exceeding five years.

Finally, s. 7 of the Betting Act 1953 enacts that:

(1) Any money or valuable thing received, by any person convicted under section 6(3), as a deposit or in settlement of any bet or wager shall be deemed to have been received to or for the use of the person from whom the same was received.

(2) Such money or valuable thing, or the value thereof, may be recovered accordingly with full costs of suit in any court of competent jurisdiction.

These two legislations (the CGH Act and the Betting Act 1953) must be taken in its correct perspective and when so taken the matter of crucial importance emerges. That would be this. In the event the plaintiff successfully establishes at the trial proper that the entire transaction between the first defendant and the second defendant was illegal, then the ultimate consequence would be that the second defendant would not be a *bona fide* holder for value and would be a constructive trustee of the monies so received. Must a contract tainted with illegality be enforced? Certainly not. There are two types of illegality. The first one would be an illegality as to formation while the second would be in regard to an illegality as to performance. The first illegality refers to the situation where the contract itself is illegal at the time of inception. The second illegality relates to a contract which on the face of it is legal but it is performed in a manner which is illegal. Thus, a contract which is illegal in its formation or it is intended to be performed in a legally prohibited manner then the courts will not be inclined to enforce the contract. It is at the trial proper that the plaintiff is able to establish the illegality of the whole transaction between the first defendant and the second defendant. The case of *Levy v. Yates* [1838] 8 A. & E. 129 was a classical example of a contract which was illegal at the time of its inception. There the statute prohibited the contract between a theatre-owner and an impresario for the performance of a theatrical production. Whereas the case of *Ashmore, Benson, Pease & Co Ltd v. A.V. Dawson Ltd* [1973] 1 WLR 828 was a case that was illegal as to performance so much so that either party was barred from maintaining an action in regard to it. The case of *Govindji & Co. v. Soon Hin Huat* [1982]

1 MLJ 255 FC centred on the contract for the sale of copra where the buyers were not licensed. In dismissing the appeal, the Federal Court held that as the appellants did not have a licence to purchase copra, the contracts entered into were clearly in contravention of the law such that the consideration was unlawful and therefore void. Then there is the case of *Re Mahmoud & Ispahani* [1921] 2 KB 716 CA which was also on illegal contract and the facts may briefly be stated as follows. In 1919, under the Defence of the Realm Regulations, an Order was made prohibiting the purchase or sale of linseed oil without a licence. The plaintiff, who had a licence, sold linseed oil to the defendant, having been incorrectly assured by the defendant that the defendant also had the required licence. The terms of the plaintiff's licence specified that delivery was only to be made to persons who held a licence. The defendant subsequently refused to accept delivery of the linseed oil, pleading that, due to his own absence of a licence, the contract was illegal. It was held that since the defendant had no licence the contract of sale was prohibited by the Order. The contract was therefore illegal and unenforceable by the plaintiff. Atkin LJ delivering the judgment of the Court of Appeal made these observations:

> When the Court has to deal with the question whether a particular contract or class of contract is prohibited by statute, it may find an express prohibition in the statute, or it have to infer the prohibition from the fact that the statute imposes a penalty upon the person entering into that class of contract. In the latter case one has to examine very carefully the precise terms of the statute imposing the penalty upon the individual. One may find that the statute imposes a penalty upon an individual, and yet does not prohibit the contract if it is made with a party who is innocent of the offence which is created by the statute. Here it appears to me to be plain that this particular contract was expressly prohibited by the terms of the Order which imposes the necessity of a compliance with the licence. With great respect to the learned judge, I think the underlying fallacy in his judgment is that he has not directed his attention to the terms of the licence or to the terms of the Order which says that no sale shall be made unless it complies with the terms of the licence. When one looks at the licence one finds an express prohibition against the plaintiff selling to the defendant as the latter had not a licence.

Next, would be the case of *Anderson Ltd v. Daniel* [1924] 1 KB 138 where the court held that the seller could not claim the price of the fertilisers because his failure to present the invoice had rendered the contract illegal. Reverting back to the issue of constructive trust, I need only say that it is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience (*Soar v. Ashwell* [1893] 2 QB 390). Cardozo J aptly defined constructive trust in *Beatty v. Guggenheim Exploration Co.* 225 N.Y. 380 at 386 [1919] as:

... the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.

I will now revert back to the CGH Act, in particular s. 2(1) thereof where the following pertinent definitions were set out:

'common gaming house' includes -

(a) any place kept or used for gaming to which the public or any class of the public has or may have access;

(b) any place kept for habitual gaming, whether the public or any class of the public has or may have access to it or not;

'place' means any house, office, room or building and any place or spot, whether open or enclosed, and includes a ship, boat, or other vessel, whether afloat or not, and any vehicle.

It is also useful to refer to s. 3 of the CGH Act where it enacts that:

3. Nuisance

Every common gaming house is hereby declared to be a common and public nuisance contrary to law.

Section 4 (1) of the CGH Act goes on to say that:

4. Offences relating to common gaming house.

(1) Any person who -

(a) being the owner or occupier or having the use temporarily or otherwise thereof keeps or uses a place as a common gaming house;

shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than five thousand ringgit and not more than fifty thousand ringgit and shall also be punished with imprisonment for a term not exceeding three years.

Finally, s. 10 of the CGH Act enacts as follows:

10. Money paid recoverable.

Any money or money's worth paid or deposited for or in respect of any such event or contingency as aforesaid or for or in respect of the purchase of a lottery ticket shall be recoverable as money had and received to or for the use of the person from whom the same was received.

The preamble to the CGH Act states that it relates to the suppression of common gaming houses, public gaming, and public lotteries. Thus, when Parliament enacts the CGH Act it seeks to prohibit common gaming house activities unless they are licensed by the Minister. Then there is s. 24 of the Contracts Act 1950 which enacts that:

> The consideration or object of an agreement is lawful, unless -
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

and it is crystal clear that gambling is an illegal activity save in circumstances where the operator is in possession of a valid licence (s. 27A of the CGH Act) and, consequently, any contract in which the consideration was paid for gambling activities would be illegal and unenforceable in Malaysia. The second defendant relied heavily on the fact that the gambling activities took place in international waters and as a result of which, so it was submitted, that there was no requirement for the second defendant to hold a licence under Malaysian law. With respect, this argument is untenable and wholly without merit. By the second defendant's own sworn testimony the sum of RM4.5 million was paid to it within Malaysian jurisdiction and it was in consideration of this payment that the first defendant was allowed to gamble the said sum on the second defendant's vessel or cruise ship MV Amusement World. Now, since the consideration for which the second defendant received the sum of RM4.5 million from the first defendant was in itself illegal, the second defendant cannot be classified as a *bona fide* third party who had given value. If the second defendant was not a *bona fide* third party who had given value then the second defendant must be deemed to be a constructive trustee for the plaintiff and must, of necessity, be made to account to the plaintiff for the sums so received. This approach was also adopted by Chua J in the case of *E.G. Tan & Co. (Pte) v. Lim & Tan (Pte) & Anor* [1987] 2 MLJ 149 and at p. 151 his Lordship said:

Evidence was adduced by the plaintiffs of what the second defendant told the remiser Alfred Lim. Lim said that he knew the second defendant and had acted in the past as his remiser in the sale and purchase of stocks and shares. On or about September 25, 1981, the second defendant telephoned Lim to seek advice regarding 1000 Pan Malaysia Cement shares which the second defendant said 'he acquired by way of, in satisfaction of a gambling debt.' He gave the advice to have the shares registered in the second defendant's name. The second defendant then brought the share certificate and the transfer deed to G.K. Goh Securities (Pte) and sought the help of the firm to have the shares registered in his name. Lim said:

> It is not the usual practice to ask clients to register shares into their names but in this instance my advice to 2nd defendant was to register it into his own name because he mentioned to me that he had acquired the shares in satisfaction of a gambling debt.

The second defendant, however, in evidence said that what he told Lim was that he bought the shares from a friend who needed money urgently to settle a gambling debt and that he had sought legal advice and was advised to have the shares registered in his name. Lim agreed that that was a good move.

Lim was emphatic that the second defendant told Lim on the telephone that his friend had lost some money to him in gambling over some card games. He said that he knew of clients who bought shares from friends and he would advise them to register the shares into their names to ensure that they would get a good title and that they were not stolen or forged shares. He said that private sales of shares were infrequent and he would advise his clients to be wary. If the second defendant had told him that the shares were fraudulently obtained he would not have advised him to have the shares registered into his name. The second defendant did not at any time tell him that these shares were fraudulently obtained.

Counsel for the second defendant suggested that Lim had a poor recollection or he had misunderstood the second defendant and submitted that Lim's evidence is unreliable.

I do not think that Lim had a poor recollection or that he misunderstood the second defendant. I accept Lim's evidence that the second defendant told him that he (the second defendant) obtained the shares in satisfaction of a gambling debt.

In my judgment, the fact that the second defendant conducted the gambling activities in international waters was totally irrelevant since the second defendant, by their own admission, admitted receiving RM4.5 million within jurisdiction in pursuance of the gambling activities. Evidence wise this was clearly borne out by the affidavit of Ng Eng Leng in encl. 28 at para. 10 as reproduced in the early part of this judgment. The exhibit marked as "NEL-1" adverted to at para. 10 of encl. 28 makes for interesting reading. It was worded thus:

Sheet 1

DEMAND DRAFTS CHECKED-IN BY EUGENE TAY

CHEQUES/CASH RETURNED TO HIM FOR HIS WINNINGS

DATED	RM			RM	RM NET RECEIVED
15.4.98	500,000		CASH	(30,485)	
22.4.98	750,000		CASH	(167,880)	
		RETURN	MBB607301	(750,000)	
29.4.98	300,000		CASH	(3,519)	
			MBB607309	(100,000)	
6.5.98	900,000	RETURN	MBB607327	(900,000)	
18.5.98	750,000		MBB607326	(495.642)	
26.5.98	500,000		CASH	(379)	RENAISSANCE
			MBB607344	(499,621)	S$9990/.415
28.5.98	500,000		CASH	(24,072)	
2.6.98	300,000		CASH	(12,831)	
	4,500,00			**(2,984,429)**	**1,515,571**

It was patently clear that the affidavit evidence of the second defendant through Ng Eng Leng in encl. 28 of para. 10 illustrated the nexus between the receipt of the monies within jurisdiction and its ultimate use for gambling outside jurisdiction. This brings to the forefront the question of law of crucial importance, namely:

> Whether the monies so received were received within jurisdiction in relation to a contractual relationship that was not capable of recognition by this court's jurisdiction?

Obviously the monies were so received within jurisdiction and not capable of recognition by this court. In my judgment, a cruise ship or vessel like MV Amusement World which carries on gambling activities in international waters cannot earn the right to keep the monies so received when such payment was made within jurisdiction and based on a gambling contract. A transaction of this nature must be void as the Malaysian law does not recognise a gambling contract. Put it in another way, the Malaysian law does not recognise gambling contracts or transactions and these are considered void. In Latin language, it is *nudum pactum*. In English, it means an empty contract. As an empty contract, no legal right or liability can arise from it. As far as the Malaysian law is concerned it makes no difference even if the gambling has taken place in another country which allows a claim for a gambling debt. The law is

double edged. A gambling den cannot sue its loser for a gambling debt and neither can a winner claim from the gambling den if he is given a dud cheque. The second defendant's cruise ship or vessel MV Amusement World knew the implication of its business and that was why it organised floating casinos at sea, in a "no-man's land." The law does not recognise the concept of a "no-man's land" and when the second defendant's cruise ship or vessel MV Amusement World carried out its gambling operations in international waters it knew that things could go wrong. Things did go wrong and in such a case no civilised judicial system of law can sit back and smile and act nonchalantly as if nothing has happened. This court must act swiftly and strike down an illegal contract.

The fact of the matter remains that the courts in this country are not meant for use by all and sundry for the recovery of gambling debts. Every lawyer in town knows that. It is the duty of this court to see the wood from the trees and when so seen the actions which are in reality actions in respect of betting transactions between the first defendant and the second defendant should not be allowed to continue. The defence of the second defendant was nothing more than mere denials of the following:

(1) that there was a nexus between the plaintiff and the second defendant;

(2) that the second defendant was a trustee of the plaintiff and that the second defendant had converted the money to its own use;

(3) that the second defendant was a constructive trustee to the plaintiff in relation to RM4.5 million spent by the first defendant on board the cruise ship or vessel MV Amusement World; and

(4) that the plaintiff had a cause of action against the second defendant.

The second defendant held steadfastly to the defence that the bankers drafts being negotiable instruments were accepted in good faith and for valuable consideration with no knowledge of its defects for gaming at the casino of MV Amusement World plying in international waters by the first defendant. I will now say something of negotiable instruments like the bankers drafts. They can be transferred from one person to another. Any holder of it can bring an action to enforce it and become a party to it. But the plaintiff say that the bankers drafts that were paid to the second defendant were the plaintiff's monies that had been debited from the plaintiff's account with the bank by the fraud that was perpetrated by the first defendant.

I will now proceed to examine wagering and gaming contracts. Hawkins J in *Carlill v. Carbolic Smoke Ball Co* [1892] 2 QB 484, 490 defined a wagering contract as:

> ... one by which two persons professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum or money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties.

A wager can be for a future event or a past event. In a contract of a wager there must always be a winner and a loser. In other words, a contract is not a wager if one party cannot win and if the other party cannot lose. In *Carlill v. Carbolic Smoke Ball Co. (supra)* the defendants made a promise to pay 100 pound to anyone who caught influenza after using a smoke-ball manufactured by them. The court held that this was not a wager as the user could not lose anything if he failed to catch influenza. *Ellesmere v. Wallace* [1929] 2 Ch. 1, 55 defined gaming to mean the playing of any game for money or money's worth, and a game for this purpose must, according to *Applegarth v. Colley* [1842] 10 M. & W. 723, include horse-racing. I have in the early part of this judgment referred to s. 2 of the CGH Act where the word "gaming" has been defined to mean a game of chance or of mixed chance and skill for money or money's worth and includes the playing of any game specified in Column 1 of the First and Second Schedules. A wagering transaction is no better than a gaming contract. The English Marine Insurance Act 1749 and the English Marine Act 1906 gave effect to the principle of *nudum pactum* and declared that wagering and gaming to be void. The English Gaming Act 1845 acted in concert and nullified all contracts of gaming or wagering. In short, under the English Gaming Act 1845 all contracts to gamble were *nudum pactum*. In those days, the English - fine ladies and gentlemen gambled freely and incessantly. Huge sums of money changed hands over cards and dice. This gave rise to the English Gaming Act 1710 which enacted that all forms of gaming were void. But the English Gaming Act 1710 did not put an end to gaming. Instead gaming flourished. It must be emphasised that the classical principle of *nudum pactum* was drawn from the English Marine Insurance Act 1745. Later, when the English Gambling Act 1845 was passed – all contracts and agreements entered by way of gaming or wagering became void. The evils of gambling are too well known and too unsavoury to elaborate. Public policy became the order of the day and the policy was to suppress gambling at all costs. The Courts showed no mercy to gamblers. Section 18 of the English Gaming Act 1845 declared that (1) the contracts of gaming and wagering are null and void; (2) the winner cannot bring an action to recover his winnings; and (3) the winner cannot sue the stakeholder. These are harsh measures.

I have painted the statutory scenario in England so as to better understand the principle of *nudum pactum*. Section 18 of the English Gaming Act 1845 went through difficult times. It was adversely commented in *Read v. Anderson* [1884] 13 QBD 779 (CA), and the English Parliament had to overrule *Read v. Anderson* by passing the English Gaming Act, 1892. The case of *Hill v. William Hill (Park Lane) Ltd* [1949] AC 530 gave a correct interpretation to s. 18 of the English Gaming Act 1845 when Lord Greene at p. 552 observed in lucid terms:

> Section 18 of the Gaming Act, 1845, by its first branch makes gaming and wagering agreements null and void. Such contracts therefore are struck with invalidity at the outset, ie before the event contemplated by the wager has occurred. The appropriate consequence of this enactment would be relief before the event by way of declaration and perhaps an order for delivering up of a written agreement as well as relief after the event by way of dismissal of an action to recover a sum won. The second branch is different. It is concerned with a state of affairs which can only arise after the event. What it prohibits is the bringing of any suit 'for recovering any sum of money or valuable thing alleged to be won upon any wager.' The first argument on behalf of the respondents is that the second branch merely repeats, in language appropriate to procedure, what has already been enacted as a matter of substantive law by the first branch and is in effect tautological.
>
> I am unable to accept this argument. The language of the first branch is entirely different from the language of the second branch. Under the first branch the agreement is a nullity before the race is run. The second branch assumes the race to have been run and the bet to have been lost. It is true that the language of the second branch would prohibit the bringing of an action upon a wager which had been won. To that extent I agree that it covers ground already adequately covered by the first branch. But this is no justification for limiting the words of the second branch as suggested. They are quite general and when read in their ordinary meaning they extend to any action to recover money alleged to be won on a wager.

It was around this time, that the unscrupulous in England devised a practice disguising gambling debts as account stated. But the English Courts were very alert. In *Law v. Dearnley* [1950] 1 KB 400 (CA), the Court of Appeal looked at the reality of the transaction and held that the account stated being in respect of betting transactions were considered to be null and void under the Gaming Acts. The Court of Appeal in another case by the name of *MacDonald v. Green* [1951] 1 KB 594 (CA) saw through the arrangement and quickly recognised that the true nature of the transaction was to recover the defendant's betting losses. According to Asquith LJ the loan label was nothing more than a ruse to get around the Gaming Acts.

In my judgment, false labelling of a gambling debt as an account stated or as a loan cannot derogate it from being a gambling debt. A rose is still a rose no matter what you call it. The court must look at the reality of the transaction and decide once and for all without fear or favour. To me the device of using chips on board the cruise ship or vessel MV Amusement World by the second defendant was a mere sham to circumvent the CGH Act and the Betting Act. The matter arose out of a betting transaction, although the second defendant called it as a contract. Under the Malaysian law such a transaction was absolutely void. I must on my own motion take the point that a betting transaction must be struck down as being void. This course of action is permissible, borrowing the words of Scrutton L.J. in *Phillips v. Copping* [1935] 1 KB 15 at p. 21: "It is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it." Thus, no right or obligation can arise when a contract is rendered void by a statute. It has no legal force at all and it is *nudum pactum*. No subsequent right can be based or founded on a void contract. What is void will remain so forever and nothing useful can spring from it. On void contract, Gilard J had this to say in *Sharp v. Ellis; Re Edward Love & Co Pty* [1971] 20 FLR 199 at p. 205:

> If the original agreement were rendered null and void by the existing law and one party performed his part of the illusory bargain, such performance would be without any contractual significance whatever and no right or remedy, either expressly or impliedly, would arise from that performance in his favour.

Thus, a bill or a note given in respect of a void contract is void (*Levene v. Brougham* [1909] 25 TLR 265). There are no two ways about it. In the context of the present case, the gambling on the casino of MV Amusement World by the first defendant using bankers drafts of RM4.5 million lodged with the second defendant's account at Malayan Banking Berhad was not only illegal but void. There was thus no contract at all. The second defendant was not a *bona fide* holder for value who could hold onto the bankers drafts of RM4.5 million. The principle of constructive trust would work marvellously for the benefit of the plaintiff. This was the pith and substance of a void contract.

Striking Out And Other Miscellaneous Issues

Thus far I have dealt in some detail certain salient parts of the whole case so as to illustrate that the plaintiff's claim was far from frivolous, vexatious or an abuse of the process of the court. The authorities on striking out are numerous and these authorities are found in the law journals. The Federal Court in *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28 laid down the principles to be applied by the court when faced with an application under O. 18 r. 19 of the RHC. Lee Hun Hoe CJ (Borneo) delivering the judgment of the Federal Court had this to say at p. 29:

> Appellant submitted that the learned Judge was right to say that the defence had raised triable issues but was clearly wrong to strike out part of the defence. Further, respondent also conceded that the defence did raise triable issues. In this particular case triable issues were clearly raised. A perusal of the statement of account filed by respondent shows many controversial items which could only be determined by a proper trial. As there are triable issues the proper course would be for the issues to be tried in the usual manner in open Court. The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.

The English Court of Appeal in *Hubbuck & Sons, Limited v. Wilkinson, Heywood & Clark, Limited* [1899] 1 QB 86 laid down a time honoured principle that only in plain and obvious cases that recourse should be had to the summary process. Lindley MR delivering the judgment of the Court of Appeal (Lindley M.R., and Chitty and Vaughan Williams LJJ) aptly said at p. 90 to p. 91, the following:

> The application is made under Order xxv., rule 4. Order xxv. abolished demurrers and substituted a more summary process for getting rid of pleadings which shew no reasonable cause of action or defence. Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim to be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order xxv., rule 2; the other is to apply to strike out the statement of claim under Order xxv., rule 4.

and the learned judge proceeded to say at the same page:

> The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression 'reasonable cause of action' in rule 4 shews that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.

It is germane to note that prior to Lindley L.J.'s elevation as the Master of the Rolls, his Lordship had occasion to consider the scope of the rule on striking out claims in the celebrated case of *Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch. 274. There his Lordship said at p. 276 to p. 277 of the report:

> Then the Vice-Chancellor says: 'The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way.' It appears

> to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order xxv, rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched – cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether.

In my judgment, the summary process under O. 18 r. 19 of the RHC cannot simply be exercised by a minute and protracted examination of the documents together with the facts of the case so as to ascertain whether the plaintiff really has a cause of action. That should be done only at the trial proper where oral evidence can be led and tested by cross-examination. I am fortified in my view by the illuminating judgment of Danckwerts LJ in *Wenlock v. Moloney And Others* [1965] 2 All ER 871 CA and at p. 874 his Lordship said (Sellers, Danckwerts and Diplock, LJJ):

> The practice under the former rule, R.S.C., Order 25, rule 4, and under the inherent jurisdiction of the court, was well settled. Under the rule it had to appear on the face of the plaintiff's pleading that the action could not succeed or was objectionable for some other reason. No evidence could be filed. In the case of the inherent power of the court to prevent abuse of its procedure by frivolous or vexatious proceedings or proceedings which were shown to be an abuse of the procedure of the court, an affidavit could be filed to show why the action was objectionable. The commonest case was where a plaintiff was seeking to bring an action on a point which had already been decided or was obviously wholly imaginary. An example of that is *Willis v. Earl Howe* [1893] 2 Ch. 545; but, as the procedure was of a summary nature, the party was not to be deprived of his right to have his case tried by a proper trial, unless the matter was clear.
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> The position is very clearly expressed by Lord Herschell in *Lawrance v. Lord Norreys* [1886-90] ALL E.R. Rep. at page 863; [1890], 15 App. Cas. at page 219. He said:
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> > It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.
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> In that case the application succeeded in the Court of Appeal and the House of Lords because those courts concluded that the story told in the proceedings was a myth, and so the action was an abuse of the process of the court. It was a plain and obvious case.

The position under two former rules has been incorporated in the present R.S.C., Order 18, rule 19 of the new rules. There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.

In my view, the way in which this case has been dealt with is quite contrary to the practice of the court, and is thoroughly undesirable. I therefore also would allow the appeal.

In the same vein, I did say the following in the case of *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336 especially at p. 350:

Mr. Ibrahim Hashim, the learned counsel for the plaintiff, argued that the power to summarily strike out a pleading must be sparingly exercised. He relied on the passage appearing in the judgment of Mohamed Dzaiddin bin Hj. Abdullah SCJ (now FCJ) in the case of *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 2 AMR 34: 1969 particularly at page 1976 where his Lordship said:

> This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided, by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* [1915] 31 TLR 418 CA; *Wenlock v. Moloney (supra)*).

Diplock L.J. defined cause of action in *Letang Cooper* [1965] 1 QB 232 CA as:

> ... simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

Lord Esher in *Read v. Brown* [1988] 22 QBD 128 defined the phrase to mean every fact, though not every piece of evidence, which was necessary for the plaintiff to prove, if traversed, to support the plaintiff's right to the judgment of the court.

> Now, the question to pose would be this. Was there some cause of action shown by the plaintiff, however weak, or some question fit to be decided by this court? For this exercise, I need to examine the surrounding circumstances and the factual background of the case *(Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte Ltd (supra))*.

I then proceeded to say at p. 356 in the same case as follows:

> Tied up with the issue of reasonable cause of action is the question of the merits of the plaintiff's claim. In considering the defendant's application for striking out, I should not be concerned with the success of the plaintiff's suit *(Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd (supra))*. I have perused through the pleadings and the relevant affidavits and I must at once say that the statement of claim disclosed a reasonable cause of action and it should not suffer the fate of being struck off. This was not a plain and obvious case that a judge can say at once that the statement of claim 'as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for' (Lindley MR in *Hubbuck & Sons v. Wilkonson, Heywood and Clark Ltd* [1899] 1 QB 86, 91). I am mindful of the fact that the summary jurisdiction of the court was not intended to be exercised by a minute and protracted examination of the documents and the facts of the case in order to ascertain whether the plaintiff really has a cause of action.

Relying on all these authorities, it would be appropriate to say that a case should only be struck out if it is obviously unsustainable. The root word here is not "unsustainable" but rather "obviously" which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law. In my judgment, these words cannot be read to mean that the court is to undertake, at this early stage, a detailed scrutiny of the documents and examine the evidence of each party to the dispute. To interpret it as such would be to go against the grain of the provisions of O. 18 r. 19(1) of the RHC. It is apparent that this order was designed specifically to weed out claims that are clearly unfounded and the rationale behind this Order has been described lucidly by Tan Sri Chang Min Tat, a former Judge of the Federal Court, in *Mallal's Supreme Court Practice*, 2nd edn, vol. 1 at p. 219 as follows:

> This rule enforces the rules of pleading. The court has the power (i) in a summary manner, i.e. without trial, to stay or dismiss an action or enter judgment accordingly where the pleading discloses no reasonable cause of action or defence, or is scandalous, frivolous or vexatious or it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the court. The rule applies as well to an originating summons and a petition, as if the originating summons and a petition were a pleading. But the rule also empowers the court to allow amendments of any pleading in addition to the powers under Order 20.

Looking at the available affidavit evidence, the plaintiff's case cannot be said to be obviously unsustainable. There were issues – both of fact and law, that require to be tried. This was my judgment and I so hold accordingly.

Mr. Tan Choon Lim for the second defendant relied heavily on the case of *Suppuletchimi v. Palmco Bina Sdn Bhd* [1994] 2 CLJ 561; [1994] 2 MLJ 368, a decision of the High Court in Penang and argued that this court should adopt an optimum evaluation approach wherein affidavit evidence can be adduced even when deciding the issue of whether there was a reasonable cause of action. With respect, the case of *Suppuletchimi* can readily be distinguished as the learned judge in that case did not refer to the tests laid down by the superior courts in our country in two cases. The first one was *Lee Nyan Choi v. Voon Noon (supra),* a decision of the Federal Court while the second was the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, a decision of the Supreme Court. By virtue of the concept of *stare decisis*, the learned judge in *Suppuletchimi* was bound to follow the decisions of these superior courts in the country and when the learned judge applied a test which was completely irreconcilable and alien with the two decisions of the superior courts, the value of the learned judge's judgment would, as a precedent, be completely diminished into oblivion. I am not bound by the decision in *Suppuletchimi* and am free to depart from it in the light of the decisions of the superior courts which are at the pinnacle of the hierarchy of the courts in Malaysia.

Next, the second defendant also relied heavily on the decision of the Privy Council in *Tractors Malaysia Bhd v. Tio Chee Hing* [1975] 2 MLJ 1 where Lord Diplock delivering the judgment of the Board said:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the Statement of Claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the statement of claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the New Action could not possibly succeed.

and in so deciding Lord Diplock was of the view that the New Action filed by the plaintiff in that case was obviously unsustainable. In so deciding, Lord Diplock too held that the Federal Court (from whom the decision finally went to the Privy Council) should not have confined itself to the examination of

the statament of claim to determine if it disclosed some cause of action but should, in addition to that, have considered the affidavit evidence. I hasten to add that the Privy Council in *Tractors Malaysia Berhad* found that it was evident from the affidavit evidence that the action was brought to defeat the course of justice in the hope of delaying the execution of the judgment in an earlier case. Clearly therefore *Tractors Malaysia Berhad* cannot be an authority to support the optimum evaluation test as propounded by the learned judge in *Suppuletchimi's* case.

Finally, the issue raised by Mr. Clarence Edwin for the plaintiff in regard to the entry of an unconditional appearance must be considered by this court. The second defendant had entered an unconditional appearance and had served on the plaintiff a statement of defence and by these actions the second defendant would, per se, be precluded from invoking the operation of O. 18 r. 19(1) of the RHC. I have in *Lim Seak Huat v. Malayan United Realty Sdn Bhd (supra)* applied the decision of the Supreme Court in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Seng Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 and I proceeded to say as follows:

> There is one other matter that should be addressed. It is this. The defendant filed their unconditional appearance on 8 May 1995 as reflected at enclosure 4. The summons-in-chambers for striking out in enclosure 11 was dated 23 June 1995 and it was filed on the same date. Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 SC, speaking for the then Supreme Court had occasion to remark on filing an unconditional appearance in relation to an Order 18, rule 19 of the RHC's application. This was what his Lordship said:
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> > It is too late now for the defendants to invoke Order 18, rule 19 because they must have filed their unconditional appearance, thereby depriving themselves of the right to invoke Order 18, rule 19 but it is still open to them to have recourse to Order 33, rule 2 if they are so minded.
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> Applying this short principle of law to the facts of the present case, the defendant having entered an unconditional appearance on 8 May 1995 and having filed the statement of defence on 24 May 1995 was thus prevented from filing encl. 11 on 23 June 1995.

That being the case the second defendant was precluded from applying under O. 18 r. 19(1) of the RHC for striking out the plaintiff's claim. Enclosure 64 must therefore die a natural death in the face of the salutary rule enunciated by the Supreme Court in *Alor Janggus's* case. The appeal in encl. 80 should be dismissed with costs and the decision of the SAR was accordingly upheld. For my part, I look forward to the trial of this action.